

Supreme Court of the United States

OCTOBER TERM, 1960

POWER REACTOR DEVELOPMENT COMPANY, *Petitioner*,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND
MACHINE WORKERS, AFL-CIO, *et al.*, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

JOHN LOUIS O'BRIEN,

W. GRAHAM CLAYTON, JR.,

701 Union Trust Building,

Washington 7, D.C.

EDWARD S. BROWN, JR.,

RICHARD B. GIBBLE,

2750 Penobscot Building,

Detroit 26, Michigan.

Attorneys for Petitioner,

*Power Reactor Development
Company*

DIXON & BURLING,

Washington, D. C.

METTER, CASSELL, PADDOCK AND STONE,

Detroit, Michigan.

Of Counsel

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No. 315

POWER REACTOR DEVELOPMENT COMPANY, *Petitioner*,

v.

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I

Respondents suggest that the decision below presents no question of importance because all the Court of Appeals held was that the Atomic Energy Commission did not make adequately definitive safety findings as required not only by the statute but also by its own Regulations and specification of issues. They also dispute that the effect of the decision is to invalidate a regulation or to upset the Commission's settled practice in reactor licensing cases. In effect, what they now urge to this Court is that the Commission has, uniquely in this case, misapplied the statute and its regulations by failing to find *any* assurance of safety of either the particular reactor or of the gen-

eral type of reactor proposed (p. 11), and that the correction of this error by the decision below raises no question of general importance in the administration of the act. These contentions are plainly unsound.

The crux of the issue here is the validity under the statute of the basic premise on which the Commission's provisional construction permit scheme embodied in Section 50.35 of its Regulations is based. This premise is that a different standard of "reasonable assurance" is required for issuance of a construction permit "on a provisional basis" under this Regulation from that which is required to support subsequent issuance of an operating license. Although Respondents suggest (p. 11) that the decision below does not require a finding of the same assurance at these two stages, the court's opinion is clear that such a holding was the basis upon which its reversal of the Commission's order rested. As set out in our Petition (p. 14), after summarizing the safety finding required to be made by the Commission to support issuance of an operating license, the court said (App. B, p. 45):

"The question is whether it must make such a finding when it authorizes construction. In our opinion it must."

Section 50.35 of the Regulations sets up a procedure, followed in all power reactor licensing cases thus far presented,¹ pursuant to which a provisional construc-

¹ Respondents repeatedly state (pp. 10, 12, 16, 19) that the provisional construction permit issued here is the only one in which the Commission did not make the safety findings required by the statute, and that, in short, this is a unique case which stands apart from the other eight developmental power reactors and the almost sixty research reactors listed in the appendix to Respondents' brief (pp. 28-30). This is not so. Every one of the other eight power

tion permit is issued on a finding of "reasonable assurance" of the safety of the "general type" of reactor proposed. The whole purpose of this provision is to permit construction of such a reactor to be started in appropriate cases in the absence of all the technical information that would be required to support a definitive finding that the reactor when completed can be operated safely. As the Commission stated in its opinion (Tr. 6983), this approach is dictated by the technological characteristics of reactor design at this stage of development of the art. See our Petition, pp. 17-19.

The keystone of the regulatory structure established by this provision of the Regulations is thus that different standards of assurance are to be required at these two stages of the licensing process. The Commission's opinion was unmistakably explicit on this point:

"The degree of 'reasonable assurance' with respect to safety that satisfies us in this case for purposes of the *provisional construction permit* would not be the same as we would require in considering

reactors, and most of the smaller research reactors as well, were issued provisional construction permits upon the finding required by Section 50.35 of the Regulations of "reasonable assurance that a facility of the *general type proposed* can be constructed and operated at the proposed location without undue risk to the health and safety of the public" (italics supplied). As the Commission made clear in its opinion here, this Section 50.35 finding necessarily encompasses a lesser degree of assurance of safety than is required to support an operating license. The fact that this was not articulated in these other cases to the extent it was here is attributable not to any difference in the substantive findings made or quantum of proof required, but to the fact that none of the other cases was contested and there was accordingly no reason for such discussion.

"the issuance of the *operating license*" (A.E.C. Opinion, Tr. 6987).

If this basic concept is accepted, it is plain that the Commission's findings with respect to assurance of safety were fully adequate. Finding 22 stated, in the precise words of both Section 50.35 of the Regulations and of the principal issue specified by the Commission for determination at the hearing (Tr. 7020), that

"The Commission finds reasonable assurance in the record, for the purposes of this provisional construction permit, that a utilization facility of the general type proposed in the PRDC Application and amendments thereto can be constructed and operated at the location without undue risk to the health and safety of the public."

The only objection made to this finding has been that it includes the words "for the purposes of this provisional construction permit." But whether stated or not, the provisional construction permit is always the "purpose" for which a finding under Section 50.35 of the Regulations is made. The issuance of such a permit was the only issue before the Commission, and the inclusion of these words serves only to emphasize the fact, which the Commission independently made perfectly clear in both its initial and its final decision, that the degree of assurance which it found "reason-

² Both the court below (Pet. App. B, p. 48) and Respondents here (pp. 13-14) have emphasized that the Commission in its Initial Decision made an "unqualified" safety finding which it subsequently "qualified" in its Final Decision by adding the proviso that it was "for the purposes of a provisional construction permit". It is plain from the Commission's opinions in both instances, however, that these findings were intended to have the same meaning and that the proviso added was not in any sense considered to be a change of substance.

able" for purposes of a provisional construction permit was not the same degree of assurance which would be "reasonable" to support issuance of an operating license.

In reversing the Commission's construction permit order, the Court of Appeals plainly held that under the statute the Commission has no authority to require a different degree of assurance of safety at these two stages of the regulatory process. It was only because the court rejected this fundamental principle and confused the concepts involved that it thought the Commission's findings were "ambiguous". The alleged ambiguity of the findings was in no sense an independent ground of decision, but followed from the court's rejection of the Commission's basic provisional construction permit scheme. This rejection plainly presents a question of grave importance in the administration of the Atomic Energy Act which calls for review by this Court.

II

With respect to the proposed site of the reactor, Respondents suggest a very restricted interpretation of the opinion below. In their view, the court did not lay down a rule requiring "compelling reasons" for location of any reactors near population centers. On the contrary, Respondents assert that "this was not a holding, and was not a factor in the decision" (p. 19). Indeed, Respondents apparently construe the opinion below as stating only that the site is unsatisfactory for a reactor not adequately determined to be safe; as they put it, "even the *most compelling reasons* for selecting a given location *cannot substitute for the necessary safety findings*" (p. 18).³

³ It is understandable that Respondents would take this position, since neither they nor any one else prior to announcement of the

We hope Respondents are right that the opinion below meant no more than this. On its face, however, it appears to establish a rule for reactor location which is plainly inconsistent with the basic Congressional purpose and which would have drastic impact, as set out more fully in our Petition. The serious implications it would have for the United States nuclear power program emphasize the importance of review of this question by this Court.

III

Respondents seek to minimize the significance of the Court of Appeals' holding on the question of Respondents' standing to review the Commission's construction permit order by now resurrecting an argument that was made to and explicitly rejected by that court. This argument is that construction of the reactor would itself imperil the health of Respondents' members and cause them economic injury (pp. 3 and 23). As the court below pointed out, however, Respondents have conceded that mere construction of the reactor does not involve any danger to Respondents' members or their property (Pet. App. B, p. 44). So much is also obvious from the allegations in Respondents' petitions to intervene before the Commission which, contrary to Respondents' present contentions, explicitly asserted that a variety of injuries would result to them from "an explosion or other incident" due to an inherent lack of safety in the *operation* of the reactor to be constructed (*e.g.*, Tr. 6302). Thus, as the court below stated, Respondents' theory of standing necessarily rests on the proposition that "construction decision below had suggested that the site was unsuitable for a reactor of this size and type, and the Commission made a definitive finding, not attacked on review, that it was so suitable. Finding 32, Tr. 7023; see our Petition, pp. 30-32.

would cause operation, and operation would cause injury, not that construction without operation would cause injury" (Pet. App. B, p. 44).

Respondents, however, now repudiate the argument that issuance of the construction permit results in pressure on the Commission to issue an operating license because of the large sums of money invested, and state emphatically that the court below did not rest its conclusion on any such determination (p. 24). This leaves no conceivable support for the holding of that court that Respondents are aggrieved by the Commission's construction permit order except the obviously untenable theory that, because the Commission has found it probable that PRDC will be able to produce the requisite proof that the reactor can be operated safely, there is a probability that permission so to operate it will eventually be granted (Pet. App. B, p. 45). While PRDC readily agrees that it expects to adduce the requisite proof in the operating license proceedings still to be held, it is undisputed that such license can issue only after a further full hearing in which Respondents will have the right to participate as parties, and after a further decision by the Commission, subject to judicial review, as to whether this prediction of proof of safety has been translated into fact.

Respondents' position here thus boils down to the proposition that, despite the fact that the ultimate question of safety of operation of this reactor is still to be determined in a further formal proceeding, and despite the fact that no contention is now made that the issuance of this construction permit itself will injure Respondents or result in the exertion of pressure on the Commission to reach a favorable decision on this issue in such further proceeding, the mere indicated probability that the required safety showing will be made

and will result in the requested authorization is sufficient to result in aggrievement justifying review of the construction permit order at this time. Nothing in *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, touches upon this situation. For the reasons and under the authorities set forth in our Petition, it is submitted that this extends the scope of judicial review far beyond the principles laid down by this Court and accepted in other circuits. The petition to the court below to review this construction permit order of the Commission should accordingly have been dismissed.

Respectfully submitted,

JOHN LORD O'BRIAN,
W. GRAHAM CLAYTOR, JR.,
701 Union Trust Building,
Washington 5, D. C. V

EDWARD S. REID, JR.,
RICHARD B. GUSHEE,
3456 Penobscot Building,
Detroit 26, Michigan.

Attorneys for Petitioner,
Power Reactor Development
Company

COVINGTON & BURLING,
Washington, D. C.

MILLER, CANFIELD, PADDOCK AND STONE,
Detroit, Michigan.

Of Counsel

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